Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

LOT$OFF CORPORATION,

Petitioner,

v.

THE CHASE MANHATTAN BANK, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is a court of appeals entitled to vacate a jury award of punitive damages on sufficiency of the evidence grounds, even though the defendant failed to file a motion for judgment asking the trial court to review the sufficiency of the evidence prior to submission to the jury as required by Rule 50 of the Federal Rules of Civil Procedure?

Did the court of appeals violate the Re-Examination Clause of the Seventh Amendment of the United States Constitution when it overturned the jury's award of punitive damages on grounds of insufficient evidence despite the fact that the trial court was not asked before the verdict to grant judgment based on insufficient evidence?

PARTIES TO THE PROCEEDING

50-OFF Stores, Inc. (now known as LOT$OFF Corporation) and Chase Manhattan Bank, N.A. were parties before the court of appeals. Banque Paribas (Suisse) S.A. is no longer a party to this action since it settled at trial. Howard White also settled at trial after a default judgment was taken against him.

LOT$OFF Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioner, LOT$OFF Corporation ("LOT$OFF"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *50-OFF Stores, Inc. v. Banque Paribas (Suisse) S.A.*, No 98-50288, 180 F.3d 247 (5th Cir. 1999) (App. A). The judgment of the district court, No. SA-95-CA-0159 (W.D. Tex. 1997), is not published. (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 1, 1999. The court of appeals denied LOT$OFF's timely filed motion for rehearing and motion for rehearing en banc on July 30, 1999. (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Amendment VII

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

* * * *

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial; Conditional Rulings.

If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry

of judgment — and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the

judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law.

If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 51. Instructions to Jury: Objection

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

* * * *

STATEMENT OF THE CASE

LOT$OFF, formerly known as 50-OFF Stores, Inc., is a discount retailer. In the fall of 1994, the company issued 1.5 million shares of Regulation S stock for sale overseas. LOT$OFF issued the stock because it needed funds to stock its stores with merchandise for the holiday season. Due to the nature of its business, LOT$OFF is heavily dependent upon holiday sales.

Regulation S stock cannot be offered for sale in the United States until at least 40 days after closing, so it must be marketed to foreign investors. Chase Manhattan Bank is the leading foreign correspondent bank in the world. Many

foreign banks use Chase as an intermediary to trade stock in U.S. markets and as a custodian for the handling and delivery of stock issued by United States corporations.

LOT$OFF delivered its stock to Chase to be held pending payment by Banque Paribas (Suisse), S.A. ("BPS"). However, contrary to LOT$OFF's express instructions and repeated entreaties that Chase not transfer the stock without receiving payment, Chase transferred the stock away without receiving payment. The intended purchasers of the stock took advantage of the opportunity and absconded with the stock without paying for it.

As a result of the loss of the stock, LOT$OFF was financially crippled and unable to fully stock its stores with merchandise during the critical holiday season. LOT$OFF ended up bankrupt, having lost $45 million in company equity.

After a hotly contested five-week trial, the jury unanimously found that Chase Manhattan Bank converted 1.5 million shares of stock belonging to LOT$OFF, and further found that Chase did so with malice, willfulness, or callous or reckless indifference to LOT$OFF's rights. The jury awarded actual and punitive damages against Chase.

The court of appeals vacated the jury's punitive damages award, stating that the evidence was legally insufficient to support the jury's finding of malice or recklessness. LOT$OFF argued that the jury award could not be reviewed for sufficiency of the evidence because Chase did not, before submission to the jury, ask the trial court to grant judgment based on insufficiency of the evidence to support an award of punitive damages, as required by Federal Rule of Civil Procedure 50(a) and the Seventh Amendment to the United States Constitution.

The court of appeals brushed aside Chase's failure to file a Rule 50(a) pre-submission motion for judgment challenging LOT$OFF's claim for punitive damages. The court of appeals explained that it believed that Rule 50(a) was satisfied by Chase's oral objection to the jury charge shortly before it was submitted to the jury. (App. A at 18a n.12). The court then proceeded to hold that "the district court should not have submitted the issue of punitive damages to the jury," even though Chase never asked the trial court to grant judgment on the issue prior to submission. (*Id.*) The court of appeals did not address how sufficiency review absent a Rule 50(a) motion could be reconciled with LOT$OFF's right to a jury under the Seventh Amendment, apparently believing that the Seventh Amendment is not implicated.

A. Chase Files a Rule 50(a) Motion for Judgment, But The Motion Does Not Mention Punitive Damages

After LOT$OFF closed its case-in-chief, Chase moved for judgment as a matter of law pursuant to FED. R. CIV. P. 50(a) on the sole ground that LOT$OFF's conversion claim was deficient. Chase's motion did not mention LOT$OFF's claim for punitive damages.

At the close of all of the evidence, Chase orally re-urged its Rule 50(a) motion for judgment on the same bases set forth in its written motion (which did not include a sufficiency of the evidence challenge to the punitive damages issue), and the trial court denied the motion. Only minutes before the case was sent to the jury, Chase orally objected to the court's proposed jury charge on the ground, among others, that there was not "any kind of conduct on the part of Chase anywhere in the record that would justify the

imposition of punitive damages." Chase did not ask for judgment, and made no effort to explain how the law or facts supported its objection, which the trial court overruled.

The jury unanimously found that Chase converted LOT$OFF's stock with "malice or willfulness or with callous and reckless indifference" to LOT$OFF's rights. The jury awarded LOT$OFF $12.975 million in actual damages for the converted stock and consequential damages, and awarded $138 million in punitive damages. District Judge Garcia applied a settlement credit against the award and entered judgment in favor of LOT$OFF for $148,575,000.

Chase filed a number of post-judgment motions including a "renewed" motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b). In that motion, Chase argued for the first time that it was entitled to judgment on the issue of punitive damages because there was insufficient evidence that Chase had acted with malice. LOT$OFF objected to this argument on the ground that Chase was not entitled to raise an issue in its Rule 50(b) motion that it had not previously raised in its Rule 50(a) motion. The district court denied Chase's post-judgment motions and Chase appealed. The court of appeals vacated the punitive damages award on the basis of insufficient evidence, but affirmed the remainder of the judgment.

B. Facts of the Case—Chase Converted LOT$OFF's Stock

These are the essential facts of the case. Based on these facts, including direct admissions by Chase personnel that Chase intentionally transferred the stock contrary to LOT$OFF's instructions, the jury found that Chase acted maliciously, willfully, or with callous or reckless indifference to LOT$OFF's rights.

On November 14, 1994, LOT$OFF's escrow agent delivered 1.5 million shares of LOT$OFF stock to Chase with a delivery note informing Chase that "[t]hese shares have a debit balance due." The delivery instructions had been provided by a Chase Account Administrator. Chase knew the shares had not been paid for and agreed to hold the stock pending payment by its customer, BPS, who represented the intended purchasers of the stock. The clerk working at Chase's receive window placed the stock in a holdover account pending payment and placed a restrictive CUSIP number on the stock to prevent transfer of the stock until payment was received.

However, on November 18, 1994, the Chase Account Administrator who had provided the delivery instructions, knowing that restrictive CUSIP had been placed on the shares to prevent trading, moved the LOT$OFF stock from the holdover account into a BPS account for trading contrary to the delivery instructions. Chase's in-house attorney admitted that Chase made a "*deliberate, conscious decision*" to disregard LOT$OFF's delivery note.

In January 1995, unknown to LOT$OFF, Chase had the stock re-registered into a Chase street name. Upon learning that the shares had been reregistered, LOT$OFF's lawyer, J. Patrick Ryan, contacted the Security Control Analyst at Chase who handled the re-registration. On January 26, Ryan told the Analyst that the shares still had not been paid for and questioned the re-registration. The Analyst assured Ryan he would contact "the appropriate person and have them look into it."

On the day Ryan contacted Chase, all 1.5 million shares of LOT$OFF's stock remained in Chase's custody. That day, despite Ryan's warning, Chase again disregarded

LOT$OFF's instruction and deposited the shares into its account at the Depository Trust Company ("DTC") to facilitate electronic trading. On January 27, Ryan faxed the Security Control Analyst a letter stating that the shares had not yet been paid for and warning him that trading the LOT$OFF shares could violate federal securities laws. Despite this, on the day Ryan's letter arrived, Chase allowed its customer, BPS, to trade away the first 10,000 shares of LOT$OFF's stock. Chase's own banking expert testified at trial that Ryan's letter was "a flag that something was not correct," and that Chase should have acted on it as quickly as possible.

LOT$OFF learned in mid-February that Chase had placed its shares into electronic form at the DTC. Ryan again contacted the Security Control Analyst, again warned against violations of federal securities law, and again followed up with a letter — this time demanding immediate return of LOT$OFF's stock. The Analyst sent both Ryan letters to the Account Administrator, confirmed the shares still had not been paid for, and forwarded Ryan's letters to an Assistant Treasurer. After investigating the situation, Chase's Assistant Treasurer reported what she knew to six other managers: that LOT$OFF was demanding the return of its shares that had been delivered to Chase "with an instruction letter to *hold securities pending payment* from the customer." Despite this knowledge, Chase did not return the shares and never sent the report to its customer, BPS.

The Assistant Treasurer referred the matter to a Vice President and Senior Associate Counsel, who assigned a lawyer in her department to handle it. The Chase lawyer was so alarmed by what she learned that she called Chase's security officer and froze the LOT$OFF shares. But she lifted

the freeze in less than 24 hours, having conducted no investigation other than to make sure that Chase had an indemnity agreement with BPS. The lawyer admitted that Chase personnel made a "deliberate, conscious" decision not to give effect to the delivery note, but never told LOT$OFF or BPS. On February 28, after consulting four other Chase lawyers, she drafted a letter to BPS seeking indemnification for liability in connection with Chase's handling of the stock:

> This is the second instance in which questions of payment for securities held in your account at Chase have arisen. . . . [] Regarding 50-OFF . . . sales of the securities have continued. Under these circumstances, we must again remind you of your obligation to indemnify Chase against all liability. . . .

On Friday, March 3, Chase's lawyer finally spoke to Ryan for the first time. In the weeks since Chase received Ryan's first letter, it had allowed its customer to trade nearly one million shares of LOT$OFF stock, but 507,300 shares still remained at Chase. Two business days later, Chase transferred LOT$OFF's remaining shares out of its customer's account. Two Chase Managers signed off on the transfers. LOT$OFF never received any payment for its stock.

As a result of Chase's conduct, LOT$OFF suffered actual damages of at least $5,475,000 and consequential damages of at least $7,500,000. LOT$OFF had issued the stock because it needed additional funds to obtain merchandise for the holiday season. The loss of the proceeds of sale of the stock crippled LOT$OFF during the retailer's most important time of the year, propelling LOT$OFF into a "downward spiral into bankruptcy." The conversion of the

stock caused LOT$OFF to suffer an overall loss in equity of $45 million. The jury assessed punitive damages equaling three times the destroyed value of LOT$OFF, an amount which equaled about 3% of Chase's profit for one year.

C. A History of the Constitutional Basis of Federal Rule of Civil Procedure 50

Rule 50 of the Federal Rules of Civil Procedure governs motions for judgment as a matter of law. A motion for judgment is the mechanism whereby a party may ask the trial court during trial to grant judgment on an issue against the opposing party on the ground that "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the opposing] party on that issue. . . ." FED. R. CIV. P. 50(a)(1). The motion for judgment must be filed prior to submission of a case to the jury, and the motion must "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." *Id.* (a)(2). If the trial court does not grant the motion before submission to the jury, the motion is deemed reserved for reconsideration after the verdict is rendered if the party seeking judgment timely renews the motion. *Id.* (b).

Rule 50's requirement that a motion for judgment be filed prior to submission to the jury is firmly rooted in the Seventh Amendment. The Rule originated as a solution to the Seventh Amendment problem addressed by this Court in *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913). In *Slocum*, the defendant filed a motion for directed verdict before the case was submitted to the jury. The trial court denied the motion outright, without reserving decision. The jury rendered its verdict in favor of the plaintiff, but the defendant persuaded the court of appeals to reverse the

judgment based on insufficiency of the evidence to support the verdict. This Court held that the court of appeals violated the Seventh Amendment when it directed entry of judgment contrary to the jury's verdict. The Court ruled that, although the defendant was clearly entitled to judgment, the court of appeals could not substitute its judgment on the facts for the jury's verdict. The only constitutional alternative was to order a new trial. *Slocum*, 228 U.S. at 379-80.

In *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1934), the Court found a solution to the *Slocum* problem. The trial court in *Redman* had reserved judgment on the defendant's motion for directed verdict and submitted the case to the jury subject to his ability to revisit the issue after verdict. The jury found for plaintiff and the trial court denied the reserved motion for directed verdict, but the court of appeals reversed for insufficient evidence and remanded for a new trial. *Id.* at 656.

This Court held that the court of appeals was entitled to enter judgment contrary to the verdict because the trial court had expressly reserved the pre-submission motion for directed verdict. The Court explained that one of the functions of the Seventh Amendment is to prevent the judiciary from encroaching upon the fact-finding domain of the jury.

> The aim of the Amendment . . . is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the

> contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.

Id. at 657. The Court distinguished *Slocum*, where the trial court had not reserved the motion, on this basis. *Redman*, 295 U.S. at 658-59. After *Redman* the question was settled: Under the Seventh Amendment, the court of appeals cannot render judgment contrary to the jury's verdict unless the trial court expressly reserved decision on a pre-submission motion for judgment. *See, e.g., Aetna Ins. Co. v. Kenedy ex rel. Bogash*, 301 U.S. 389, 394 (1937); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 250 (1940); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 846 n.17 (5th Cir. 1975).

The Federal Rules of Civil Procedure were adopted by this Court in 1937. Rule 50 codified the analysis of *Redman*. The Rule provided, and provides today, that whenever a district court denies a pre-submission motion for judgment, the legal question of sufficiency of the evidence is deemed reserved for revisitation after verdict. *Montgomery Ward*, 311 U.S. at 244, 250.

Shortly after it was adopted, this Court recognized that the Rule 50 procedure was intended to replace the requirement of expressly reserving judgment on pre-submission motions for judgment, a practice which "was an incident of jury trial at common law at the time of the adoption of the Seventh Amendment to the Constitution." *Id.* at 250; 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2522 (2d ed. 1994) ("Rule 50(b) supplied a fiction to replace the express reservation that distinguished Redman from Slocum."); *Johnson v. New*

York, N.H. & H.R.R., 344 U.S. 48, 52-53 (1952) (Rule 50 was adopted to provide a concise procedure clearing up the confusion engendered by *Slocum* and *Redman*). The Court also stressed that the rule did "not take[] away from juries and give[] to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact — a jury being the constitutional tribunal provided for trying facts in courts of law." *Berry v. United States*, 312 U.S. 450, 453 (1941).

Thus, whether a pre-submission motion for judgment must be filed before a reviewing court is entitled to overturn a jury verdict on insufficiency of the evidence is not merely an important procedural question; it implicates fundamental constitutional issues concerning preservation of the jury's province as fact finder from judicial encroachment.

REASONS FOR GRANTING THE WRIT

This case presents exceptionally important questions — can a court of appeals or district court substitute its judgment for a jury verdict even though the complaining party did not file a pre-submission motion for judgment pursuant to Federal Rule of Civil Procedure 50? Can the strictures of Rule 50, despite the rule's constitutional underpinnings and the repeated efforts of the advisory committee to emphasize its mandatory nature, be disregarded by a court of appeals or district court on the grounds that the court disagrees with the jury's interpretation of the facts? Or does this Court continue to adhere to *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913); *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1934), and other cases where the Court held that unless the trial court reserves decision on a pre-submission motion for judgment, the procedure now codified

in Rule 50, neither the trial court nor the court of appeals is entitled to render judgment contrary to the verdict? The court of appeals decision in this case effectively renders Rule 50 superfluous, conflicts with the decisions of other courts of appeals, disregards the constitutional sanctity of the jury's verdict, and usurps the jury's constitutional role as arbiter of the facts.

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' OPINION RENDERS RULE 50(a) SUPERFLUOUS BY HOLDING THAT A CURSORY ORAL OBJECTION TO THE CHARGE SATISFIES RULE 50(a) AND EMPOWERS THE COURT OF APPEALS TO OVERTURN JURY FINDINGS BASED ON INSUFFICIENCY OF THE EVIDENCE

Rule 50 does not provide for any exceptions to the pre-submission filing of a motion for judgment. The courts, however, have occasionally excused technical non-compliance with Rule 50 if the deviation is "de minimis" or the party makes a motion which is the "functional equivalent" of a Rule 50 motion. *McCann v. Texas City Refining, Inc.*, 143 F.3d 955, 961 (5th Cir. 1993); *Boynton v. TRW, Inc.*, 858 F.2d 1178, 1185-86 (6th Cir. 1988); *Anderson v. United Tel. Co.*, 933 F.2d 1500, 1505-07 (10th Cir. 1991).

Of all the circuits, the Fifth Circuit has distinguished itself in its readiness to forgive non-compliance with Rule 50. *See* 9 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 50.05[1] (3d ed. 1999) (singling out the Fifth Circuit for its non-literal reading of Rule 50); *see, e.g., Bartley v. Euclid,*

Inc., 158 F.3d 261, 275 (5th Cir. 1998) (holding objection to charge served as "functional equivalent" to pre-submission Rule 50 motion even though plaintiffs failed to file any Rule 50 motion).

In 1991, in response to expanding judicial exceptions to Rule 50 which threatened to swallow up the Rule, the Court amended the Rule to limit, if not eliminate, judicial exceptions to the express requirements of Rule 50. *See EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1286-87 (7th Cir. 1995) (1991 amendment "welded shut" the "escape hatch" of judicial "end-run[s]" around Rule 50). The amendment added subsection (a)(2), which explicitly requires a pre-submission motion for judgment to "specify the judgment sought and the law and the facts" on which the movant is entitled to judgment. FED. R. CIV. P. 50(a)(2). The Advisory Committee explained the purpose of the amendment in blunt terms:

> [T]his revision alters the result in cases in which courts have used various techniques to avoid the requirement that a motion for directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict.

FED. R. CIV. P. 50(a)(2), advisory committee's note to 1991 amendment.[1]

Following the 1991 amendment, several circuits acknowledged the manifest intent of the amendment to rein

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1. The advisory committee had attempted to make a similar point in 1963: "A motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence." FED. R. CIV. P. 50(b).

in judicial exceptions to Rule 50. The Seventh and Ninth Circuits held that after the 1991 amendment only an actual motion for judgment will satisfy Rule 50. *See, e.g., AIC Security Investigations, Ltd.*, 55 F.3d at 1286; *Duarte v. Imation Corp.*, No. 97-16605, 1999 U.S. App. LEXIS 9271, at *3 (9th Cir. 1999); *Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132, 1139-40 (7th Cir. 1994).

But the 1991 amendment and the decisions of other courts of appeals interpreting it appear to have gone unnoticed in the Fifth Circuit. The Fifth Circuit has continued to liberally employ the "functional equivalent" doctrine to avoid the Rule's requirements. *See Bartley*, 158 F.3d at 275 (party not required to file "a formal, written, pre-verdict motion for judgment as a matter of law"; objection to charge sufficed as "functional equivalent" of Rule 50 motion).

In the instant case, the Fifth Circuit's leniency has reached its apogee. Under the court of appeals' holding, filing of a pre-submission motion for judgment is merely optional and no specification of law or facts is necessary, despite the precise wording of the amended Rule. A cursory objection to a jury charge moments before the case is submitted to the jury is enough, according to the court below, to satisfy Rule 50 and empower the court to later overturn the jury's verdict based on a claim of insufficient evidence.

Chase made *no attempt* to comply with Rule 50(a) with respect to the punitive damages issue. Chase did file a Rule 50(a) motion at the close of LOT$OFF's case, but the motion did not mention punitive damages, much less challenge the sufficiency of the evidence supporting punitive damages. When Chase orally re-urged its motion at the close of all the evidence, it did so "on the same bases we alleged and raised in our Rule 50 motion that we filed in writing with the court."

Chase's only pre-verdict argument relating to punitive damages came during the jury charge conference held minutes before closing arguments. During the conference Chase objected:

> [T]here is no basis for the submission of punitive damage questions to the jury in this case because there isn't any kind of conduct on the part of Chase anywhere in the record that would justify the imposition of punitive damages and the very submission of it is inflammatory and prejudicial to Chase.

Chase made no attempt to explain how the evidence did not support a finding of malice, willfulness or callous and reckless indifference, the three possible bases for an award of punitive damages under the trial court's unchallenged instructions.[2]

Rule 50(a)(2), added in 1991, mandates that a motion for judgment "shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Thus, according to the plain terms of Rule 50, the oral objection failed to achieve even the minimal requirements of a motion for judgment.[3]

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2. As correctly observed by the court of appeals, Chase did not complain about the jury instruction concerning the mental states which support an award of punitive damages under Texas law. (App. A, at 18a).

3. It is questionable whether the objection was sufficiently specific as a Rule 51 objection to the charge, much less as a Rule 50 motion for judgment. *See Chemical Leaman Tank Lines, Inc. v. Aetna*

(Cont'd)

The court of appeals' decision is a vivid example of precisely what the 1991 amendment was intended to foreclose. The court of appeals completely disregarded the requirement that a Rule 50 motion be filed before submission as a precondition to review of the sufficiency of the evidence to support jury findings, and effectively excised subsection (a)(2) from the Rule. *See Johnson v. New York, N.H. & H.R.R.*, 344 U.S. 48, 53-54 (1952) (Court will not "rewrite[] the rule to fit counsel's unexpressed wants and intentions"). Instead of adhering to Rule 50, the court of appeals concluded that an oral objection to the charge shortly before submission relieved Chase of the obligation to file a Rule 50(a) motion for judgment. The court of appeals even faulted the trial court for not withdrawing the punitive damages issue from the jury, even though Chase never asked for judgment on the issue prior to submission. (App. A at 22a).

The court of appeals held in footnote 12 of its opinion that "Chase's objection to the jury charge on this issue — in which Chase argued that the evidence was insufficient to submit the question of punitive damages to the jury — was sufficient to preserve the error for appeal under Fed. R. Civ. P. 50."[4]

(Cont'd)
Cas. & Sur. Co., 89 F.3d 976, 993 (3d Cir. 1996) (objection to the charge did not satisfy Rule 50 because it did not specify the law and facts entitling the movant to judgment; objection did not satisfy Rule 51 because it did not "state distinctly . . . the grounds of the objection" and did not specify the authority upon which it was based), *cert. denied*, 519 U.S. 994 (1996).

4. Chase argued below that this Court's recent punitive damages cases, primarily *BMW v. Gore*, 517 U.S. 559 (1996), call for reduced jury discretion and heightened judicial supervision in (Cont'd)

(App. A at 18a n.12) The court cited two cases in support of its holding, but in both these cases the party challenging the jury's verdict had filed Rule 50 motions addressing the issues in question at the close of plaintiffs' case, but failed to formally renew the motions at the close of all the evidence. *Scottish Heritage Trust, PLC v. Peat Marwick Main & Co.*, 81 F.3d 606, 610-11 (5th Cir. 1996); *Polanco v. City of Austin*, 78 F.3d 968, 975 (5th Cir. 1996). These courts held that the parties' failure to file formal motions for judgment after the close of all the evidence was excused because the parties had filed motions for judgment during the trial and effectively renewed these motions again after the close of all the evidence.

Here, Chase filed a motion for judgment at the close of LOT$OFF's case but the motion did not address punitive damages. Nor did Chase challenge punitive damages in any manner when it renewed the motion at the close of evidence.

(Cont'd)

constraining punitive damages awards. A similar call for curtailment of the jury's fact-finding role was recently made and rejected in *Samara Bros., Inc. v. Wal-Mart Stores, Inc.*, 165 F.3d 120, 123-24 (2d Cir. 1998), *cert. granted*, 68 U.S.L.W. 3233 (1999). The court of appeals in *Samara* rejected the suggestion that this Court has established a trend to limit the jury's role in intellectual property cases. *Id.* at 124 (rejecting claim that *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) established anti-jury trend). The court of appeals aptly commented that "there is no reason . . . to lack confidence in the ability of a jury . . . to consider thoughtfully the evidence presented and to evaluate that evidence under the standards charged by the district court. Our system relies on juries to perform these tasks even when the factual issues are challenging and subtle." *Id.*

Thus, cases where a party actually filed a motion for judgment addressing the issue are inapposite here.[5]

Even if there is still some room for judicial leniency in applying Rule 50 after the 1991 amendment, surely the Rule requires more than a non-specific, single-line objection to a jury charge moments before submission to the jury. *See Wimmer v. Suffolk County Police Dept.*, 176 F.3d 125, 136 (2d Cir. 1999) (defendant must at least identify the specific element he contends is insufficiently supported). The primary purpose of Rule 50's requirement of a pre-submission motion for judgment—apart from its underlying function as a barrier to unconstitutional judicial re-examination of jury findings—is to ensure that the trial court and opposing party have a fair opportunity to address any deficit in the evidence before the case is submitted to the jury. *See Samuels v. Air Transport Local 504*, 992 F.2d 12, 14-15 (2d Cir. 1993); *Seidman v. American Airlines, Inc.*, 923 F.2d 1134, 1136 (5th Cir. 1991); *Meriwether v. Coughlin*, 879 F.2d 1037, 1044 (2d Cir. 1989); *Grubb v. FDIC*, 868 F.2d 1151, 1160 n.12 (10th Cir. 1989).

Thus, in order to satisfy Rule 50(a), a motion for judgment must: (1) ask for judgment based on insufficiency

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5. Most of the cases recognizing judicial exceptions to Rule 50 involve this scenario, viz., the defendant filed a motion for judgment addressing the disputed issue at the close of plaintiff's case, but failed to formally renew the motion after the close of all the evidence. *See Tamez v. City of San Marcos*, 188 F.3d 1085, 1089-90 (5th Cir. 1997); *Colony, Ltd. v. Trendmaker, Inc.*, 121 F.3d 998, 1003-04 (5th Cir. 1997); *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 655 & nn.7-11 (8th Cir. 1995). This is a far different situation than presented here. *See Anderson*, 933 F.2d at 1505-07 (Seymour, J., dissenting) (criticizing majority for forgiving noncompliance even though defendant never raised specific issue in pre-verdict motions).

of the evidence; and (2) specifically identify the alleged insufficiency. *Samuels*, 992 F.2d at 15. A generic, non-specific oral objection to the jury charge, moments before the case is given to the jury, hardly satisfies either of these criteria.

Even before the 1991 amendment to Rule 50, it was clear to at least some courts that an objection to the charge cannot suffice as a Rule 50 motion for judgment, except perhaps where the trial court explicitly treats the objection as a Rule 50 motion. *See Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 814-15 (3d Cir. 1984), *followed in Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 89 F.3d 976, 992 (3rd Cir.), *cert. denied*, 519 U.S. 994 (1996).[6]

Nevertheless, the Fifth Circuit has now decided that a mere objection to the charge fulfills a litigant's obligations under Rule 50. With this holding, the court of appeals has finally severed any vestige of adherence to the letter or spirit of Rule 50. Chase's objection to the charge did not put the trial court or LOT$OFF on notice that Chase was seeking judgment based on a claimed insufficiency of evidence. *See Perdoni Bros., Inc. v. Concrete Sys., Inc.*, 35 F.3d 1, 3-4 (1st Cir. 1994) (Rule 50 motion must be specific enough to allow court to understand precisely why evidence is insufficient); *see also Johnson*, 344 U.S. at 52-53 ("Rewriting the rule to fit counsel's unexpressed wants and intentions would make it easy to reintroduce the same type of confusion and uncertainty the rule was designed to end.").

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6. Chase did not ask the trial court to treat the oral objection as a Rule 50 motion, and there is no indication in the record that the trial court understood that it was being asked for judgment based on lack of sufficient evidence.

The lack of notice is especially egregious here because Chase actually filed a Rule 50 motion, but the motion said nothing about the sufficiency of the evidence with respect to punitive damages. Surely compliance with Rule 50 cannot be excused when the court or the opposing party have been "lulled into complacency" concerning the movant's position concerning the sufficiency of the evidence. *See Rankin v. Evans*, 133 F.3d 1425, 1432-33 (11th Cir. 1998). Chase obviously made a conscious decision not to challenge the sufficiency of the evidence to support an award of punitive damages. The cases have repeatedly warned against allowing parties to conceal their sufficiency objections until after verdict, when the opposing party no longer has the opportunity to reopen its case to address alleged deficits in the evidence. *Samuels*, 992 F.2d at 14 (pre-submission motion for judgment is required "to avoid making a trap" of the post-submission motion; Rule is designed to give opposing party opportunity to cure defects in its proof); *Grubb*, 868 F.2d at 1160 n.12 (Rule 50's requirement of a pre-submission motion for judgment "prevents parties from using a motion for judgment n.o.v. as a trap after losing at trial"); *Meriwether*, 879 F.2d at 1044 (party not entitled to gamble on verdict, then raise new challenges to the sufficiency of the evidence after adverse verdict).

This Court should grant the Petition because the court of appeals has entered a decision which is in conflict with the letter and intent of Federal Rule of Civil Procedure 50 and is in conflict with the decisions of other courts of appeals construing the Rule, including the Third, Seventh and Ninth Circuits. The court of appeals' decision also constitutes a clear departure from the accepted and usual course of judicial proceedings, calling for the exercise of this Court's

supervisory powers. Finally, the proper construction of Rule 50(a) is an important federal question that this Court should clarify for the benefit of the courts of appeals and trial courts.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION TO VACATE THE JURY'S AWARD OF PUNITIVE DAMAGES FOR INSUFFICIENT EVIDENCE VIOLATED LOT$OFF'S RIGHT TO A JURY UNDER THE RE-EXAMINATION CLAUSE OF THE SEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

As touched upon in the earlier discussion of the history of Rule 50, the procedure established in the Rule is not a mere technicality which the courts have discretion not to follow. The Rule serves to protect a party's Seventh Amendment guarantee to a jury trial by ensuring that both the district court and appellate court are invited to re-examine only the *legal* question raised by the motion for judgment as a matter of law — whether the evidence is sufficient as a matter of law — and not to re-examine the facts properly found by the jury. U.S. CONST. amend. VII ("In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."); *see Miller v. Rowan Cos.*, 815 F.2d 1021, 1025 (5th Cir. 1987); *Wells v. State Farm Fire & Cas. Co.*, 993 F.2d 510, 511 (5th Cir. 1993); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 846 n.17 (5th Cir. 1975).

Rule 50 was designed to preserve the delicate constitutional balance between judicial review and the jury's

domain as finder of the facts. Under the Seventh Amendment, a reviewing court may re-examine a trial court's decision not to withdraw a case from the jury, *but only if the trial court was asked to rule on the sufficiency of the evidence before the case was submitted to the jury*. Absent such a request in the trial court, the sanctity of the jury's verdict is constitutionally protected from judges who might disagree with the jury's view of the evidence as expressed in the verdict. As aptly stated by the Third Circuit:

> Unless a court has been alerted to deficiencies in proof by a motion for directed verdict, a request that the court enter a judgment contrary to that of the jury is tantamount to asking the court to re-examine the facts as found by the jury. Such a re-examination would abridge the Seventh Amendment.

Mallick v. Int'l Brotherhood Elec. Workers, 644 F.2d 228, 233 (3d Cir. 1981). The court of appeals' re-examination of the evidence and abrogation of the jury's finding that Chase acted with malice, willfulness or callous or reckless indifference to LOT$OFF's rights violated LOT$OFF's Seventh Amendment right to a jury trial. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1172-73 (3d Cir. 1993); *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1195 n.4 (3d Cir. 1978).

Rule 50, as construed by the court of appeals, fails to achieve the constitutional function the Rule was created to perform. Under this Court's established precedents and the plain wording and intent of Rule 50, a court of appeals is not entitled to relieve a party of the obligation of filing a pre-submission motion for judgment. In doing so, the court

of appeals upset the delicate balance between judge and jury worked out by this Court and the drafters of Rule 50 many years ago, and unconstitutionally substituted its judgment for that of the jury.

Therefore, LOT$OFF petitions this Court to grant review and hold that the court of appeals violated the Seventh Amendment and departed from established precedent when it re-examined and overturned the jury's verdict based on its view of the evidence.

CONCLUSION

LOT$OFF respectfully requests that the Court grant LOT$OFF's petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JULY 1, 1999 AND REVISED JULY 23, 1999

Revised July 23, 1999

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 98-50288

50-OFF STORES, INC.,

Plaintiff-Appellee,

VERSUS

BANQUES PARIBAS (SUISSE) S.A., ET AL,

Defendants,

HOWARD WHITE,

Third Party Plaintiff,

VERSUS

THE CHASE MANHATTAN BANK, N.A.,

Defendant-Third Party Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

July 1, 1999

Appendix A

Before DAVIS, STEWART, and PARKER, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Defendant-Appellant The Chase Manhattan Bank, N.A. ("Chase") appeals a jury verdict in excess of $150 million in compensatory, consequential, and punitive damages for the conversion of 1.5 million shares of stock of Plaintiff-Appellee 50-Off Stores, Inc. ("50-Off"). For the reasons that follow, we vacate the awards of punitive damages and prejudgment interest and uphold the awards of compensatory and consequential damages.

I.

We review the record, including factual and credibility determinations and the reasonable inferences that may be drawn therefrom, in the light most favorable to the verdict. *Denton v. Morgan*, 136 F.3d 1038, 1044 (5th Cir. 1998). When viewed in such a light, the central facts of this case are as follows.

Plaintiff-Appellee 50-Off operated a chain of discount retail stores headquartered in San Antonio, Texas.[1] In October 1994, 50-Off decided to raise money through a stock offering in order to purchase inventory for the Christmas shopping season. 50-Off engaged experienced professionals, including the investment banking firm of Jefferies & Co. ("Jefferies"), to help it orchestrate the stock offering. In order to avoid the

1. At least in part due to the events leading to this lawsuit, 50-Off filed for bankruptcy in October 1996. The company has since been reformed under the name LOT$OFF Corp.

regulatory rigors of a full-blown stock offering, 50-Off decided to issue stock through Regulation S, which excused it from many of the requirements of the Securities Act of 1933. The offering under Regulation S, however, had at least one major disadvantage: the stock being issued could only be sold to foreign investors for the first forty days after closing.

50-Off and its law firm Akin, Gump, Strauss, Hauer & Feld, along with Jefferies and its law firm Morgan, Lewis, and Bockius, prepared a form subscription agreement. This agreement required payment on delivery and required that the stock bear a six-month restrictive legend. On November 8, 1994, using this form subscription agreement, 50-Off sold 310,000 shares of stock at $3.75 per share to Swiss and British investors.

Around this time, Howard White called Chris Jensen, an attorney for Jefferies. White stated that he was a lawyer who represented Banques Paribas (Suisse), S.A. ("BPS"), a major European bank.[2] He stated that BPS wished to purchase 1.5 million shares of 50-Off stock at $3.65 per share. He then introduced Jensen to three companies: Andalucian Villas (Forty-Eight), Ltd., Arnass, Ltd., and Brocimast Enterprises, Ltd. White indicated that these companies were owned by BPS, or at least closely affiliated with the bank. In reality, however, these three companies were offshore shell corporations of Yanni Koutsoubos, a BPS customer and, as 50-Off would later discover, an international white collar criminal.

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2. In reality, White is not a lawyer, nor was he ever affiliated with BPS.

Appendix A

White proposed subscription and escrow agreements more complex than those prepared by 50-Off, Jefferies, and their law firms. Under White's proposed agreements, the stock would be delivered to an escrow agent unpaid for and without a restrictive legend. The escrow agent was to deliver the stock to a bank for authentication in return for an "irrevocable bank payment guarantee." 50-Off understood that the bank would hold the stock until payment was received. Jensen and John Patrick Ryan, 50-Off's attorney, determined that White's proposed agreements satisfied Regulation S and therefore agreed to them. Dennis Morris, a Canadian attorney, was selected as the escrow agent.

On November 9, 50-Off received the executed subscription and escrow agreements. The next day, 50-Off issued 1.5 million unlegended[3] shares in BPS's name and delivered these shares to Morris. Chase Account Administrator Miha Zajec instructed White on the procedure for delivering the securities to Chase. White passed these instructions on to Morris. Morris, in turn, instructed a courier, William Jackson, to deliver the shares to Chase. Morris provided a letter to accompany the deposit stating, "These shares have a debit balance due."

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3. As noted above, shares issued under the original form agreement prepared by 50-Off and Jefferies bore a six-month restrictive legend, thus indicating that the stock came from this Regulation S offering and preventing free transferability. The 1.5 million shares for the sale to Koutsoubos were issued without a legend, making the shares harder to trace and at the same time not indicating to purchasers that the shares were restricted.

Appendix A

On November 14, BPS, a long-time Chase customer, instructed Chase, "Please accept free[4] for our account PS 97824 from Dennis S. Morris" the 1.5 million 50-Off shares. In sending this instruction, BPS was acting on behalf of its customer Koutsoubos.

Also on November 14, Jackson delivered the shares to Chase's physical receive window as per Morris's instructions. At the window, Jackson asked for Zajec, the Chase representative who had provided the delivery instructions. The employee at the window stepped away to call Zajec. The employee soon returned with Tony Dinalfo, another Chase employee, to whom Jackson pointed out the "debit balance due" language. At trial, Jackson testified,

> I showed them the fact that there was a debit balance, and that they should be aware of this because the stock is not paid for, and the bank is acting as a temporary custodian, intermediate to delivering these shares to the ultimate holder, and that they should get paid for these shares and pay us for them, or the Dennis Stephen Morris [firm]. . . . That this debit balance was a debt or a credit that they owed for the shares, and if they sent them onwards they should then get paid and transmit it back.

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4. One of Chase's expert witnesses, Walter Cushman, testified that custodial banks such as Chase receive stock for customers either "free" or versus payment. By instructing that the stock should be deposited "free," BPS was indicating that the stock was either fully paid for or that Chase would not be involved in the payment for the stock.

Dinalfo indicated that he understood, initialed parts of the delivery forms — including the statement that the shares had a "debit balance due" — and accepted possession of the stock. Dinalfo then placed an identification number known as a restrictive CUSIP on the shares, presumably to indicate that the stock had not been paid for. The same day, Chase sent Morris a receipt acknowledging the deposit of the stock. The receipt stated, "These shares have a debit balance due against them."

Thus, on November 14, 1.5 million unpaid-for and unlegended 50-Off shares, registered to BPS, were deposited at Chase. These shares were initially placed in a "holdover" account — an account used for, among other things, holding shares pending payment. At trial, Chase was unable to present the holdover account records for November 1994. Chase contended that these records had been destroyed, as is customary in the industry. Chase, however, was able to produce the holdover account records for October 1994. Chase was also unable to produce a delivery ticket — the record made of every delivery of stock to Chase — for the November 14 deposit. According to one of Chase's witnesses, Frank DeCicco, delivery tickets indicate whether stock is delivered free or if payment is due. 50-Off argued that the missing delivery ticket was consistent with the receipt and indicated that a payment was due on the 50-Off stock.

As previously noted, on November 14, Chase's customer, BPS, sent a message stating the stock was "free" and yet the deposit information indicated that the stock had a debit balance due. Walter Cushman, one of Chase's expert witnesses, testified that when the delivery instructions and

the customer's instructions are inconsistent, the stock is either held in a holdover account until the discrepancy is resolved or it is returned to the deliverer. Similarly, BPS Account Officer Ramys Molteni agreed that such a discrepancy should be corrected before the stock is deposited into the customer's account.

Chase, however, either did not notice this discrepancy or ignored it. BPS, presumably instructed by Koutsoubos, told Chase to deposit the 50-Off stock into BPS's account. Chase acted as instructed. 50-Off argued that when Chase deposited the stock "free" into BPS's account on November 18, 1994, Chase converted the stock.

The subscription agreement called for payment for the 1.5 million shares by November 25. The payment did not arrive as scheduled. 50-Off, believing that the shares were deposited in Chase under Morris's control, still attempted to close the deal. On November 30, Koutsoubos indicated that payment for one million shares was being sent. On December 2, however, Koutsoubos complained that 50-Off should have disclosed their October sales figures to him and asked that the purchase price be lowered. On December 8 or 9, 50-Off lowered the price to $3.25 per share. On December 22, 50-Off further lowered the price to $2.66. On December 29, Koutsoubos explained that he would not be able to pay for the shares until January 3, 1995, because his bank officer was on vacation. On January 18, Koutsoubos stated that a representative of 50-Off should come to Lugano to get paid.

In the meantime, BPS authorized Chase to transfer the 50-Off shares into one of Chase's street names, Egger & Co

("Egger"). On January 19, Zajec transferred the shares. Upon learning that the shares had been reregistered into the Egger account, Ryan, 50-Off's counsel, contacted Joel Brimmer, a Security Control Analyst at Chase involved in the stock transfer. On January 26, Ryan told Brimmer that the shares had still not been paid for and asked why they had been reregistered. Brimmer indicated that he would contact the "appropriate" person. On January 27, Ryan faxed Brimmer and Morris a letter expressing concern and stating that the shares had not yet been paid for. In this letter, he referenced his conversation with Brimmer the previous day. This letter stated, among other things, that 50-Off would consider it improper "for [BPS] or any of its agents, including Chase or its affiliates, to transfer or otherwise deal with [the stock] . . ." Brimmer forwarded this letter to the relevant administrative department at Chase. No administrator looked at the letter until mid-February.

Pursuant to further instructions from BPS, on January 26, Chase transferred the 50-Off stock into its account at Depository Trust Co. ("DTC"), a clearinghouse for electronic transactions, and then into DTC's street name, Cede & Co. On January 27, BPS began to sell the stock. At this point, Koutsoubos was receiving money from the sale of stock for which he had never paid.

On February 15, Ryan wrote Brimmer again, complaining about the lack of response to his January 27 letter. By February 17, Zajec was given both of Ryan's letters and he quickly forwarded them to Chase's legal department. Lourdes Fidalgo, a Chase manager, compiled a report and referred the matter to Vice President and Senior Associate

Counsel Lynne Barry, who brought in another Chase attorney, Barbara Barrantes, to investigate. Barrantes froze the 50-Off shares, but lifted the freeze after twenty-four hours. Barrantes testified that she lifted the freeze because she determined that, without court authority from a complaining party, Chase could not freeze the shares in BPS's account.

On February 28, Barrantes wrote a letter to BPS. In this letter, she expressed concern about the 50-Off transaction and another BPS transaction involving Interactive Network, Inc. ("INNN") stock.[5] She stated, "we must again remind you of your obligation to indemnify Chase against all liability, loss and expense, including attorneys' fees, which we may incur in connection with your custody account or the custody agreement."

On February 21, 50-Off filed this suit. The original defendants were BPS, Howard White, Dennis Morris, Morris & Associates, Yanni Koutsoubos, Arnass, Ltd., Brocimast Enterprises, Ltd., Andalucian Villas (Forty-Eight), Ltd., and Betafid, S.A. 50-Off alleged that the Defendants had stolen its stock, converted its stock, breached the subscription agreements and the escrow agreement, and committed securities fraud.

On March 3, Barrantes spoke with Ryan, apparently for the first time. She indicated that she could not reveal any information without a subpoena. On this date, there were still 507,000 50-Off shares remaining to be sold. Barrantes

5. The INNN transaction was another fraud scheme perpetrated by Koutsoubos.

did not reveal that shares were being sold and it is not clear whether 50-Off was aware that the unpaid-for shares were being sold or, alternatively, that there were any shares that had not been sold. Within a few more business days, the remaining half-million 50-Off shares were transferred out of Chase's control under BPS's instructions. 50-Off received no money for any of the 1.5 million shares.

In December 1996, 50-Off joined Chase as a Defendant to this lawsuit. 50-Off alleged that Chase had illegally converted the 1.5 million shares. 50-Off also alleged that Chase had aided and abetted the other Defendants in violating the Texas Securities Act. This second count against Chase was dismissed by the district court.

BPS appeared and participated in the trial. However, near the end of the trial, BPS settled for $2.4 million. Morris appeared and testified, but then disappeared. 50-Off did not pursue its claims against Morris. Neither White, nor Koutsoubos, nor any of their companies appeared.[6] During trial, the district court entered a $30 million default judgment against Koutsoubos. After trial, the district court entered default judgments for $10.575 million for compensatory damages plus $25.95 million each in punitive damages against Koutsoubos's shell companies, White, Aries Peak, and Betafid. The district court found that each had maliciously committed securities fraud.

After the presentation of evidence, Chase moved for a directed verdict on the grounds that 50-Off's conversion

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6. White's company Aries Peak had been joined in December 1996.

claim was deficient as a matter of law. The district court denied this motion and the case went to the jury on a single liability theory — whether Chase had converted 50-Off's stock. The jury found that Chase had indeed converted the stock and awarded 50-Off $5.475 million ($3.65 per share for 1.5 million shares) in compensatory damages, $7.5 million in consequential damages, and $138 million in punitive damages. The district court credited BPS's $2.4 million settlement against this award and entered a judgment in favor of 50-Off for $148.575 million.

The district court denied Chase's motions to set aside the verdict, for a new trial, for remittitur, and for other post-judgment relief. The district court also denied Chase's request to reduce the damage award by $4.3 million — the amount Jefferies, 50-Off's investment bank, paid 50-Off in a settlement.[7] Chase now appeals.

II.

Chase first argues that, as a matter of law, 50-Off did not establish conversion because 50-Off did not hold title to or possess the shares on the date of the alleged conversion. Chase also argues that 50-Off's conversion claim must fail as a matter of law because 50-Off suffered no actual damages from the alleged conversion.

A.

Under Texas law, "the tort of conversion is defined as the unauthorized and wrongful assumption and exercise of

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7. Chase does not challenge this ruling on appeal.

dominion and control over the property of another, to the exclusion of and inconsistent with the owner's rights." *Crutcher v. Continental Nat'l Bank*, 884 S.W.2d 884, 888 (Tex. App. 1994, writ denied). Chase relies on the well-established rule that a plaintiff seeking to establish conversion must prove title, possession, or the immediate right to possession of the property at the time of the alleged conversion. *See Lone Star Beer, Inc. v. Republic Nat'l Bank of Dallas*, 508 S.W.2d 686, 687 (Tex. Civ. App. 1974, no writ).

Chase argues that when 50-Off sent the shares to Dennis Morris on November 14, 1994, the company voluntarily relinquished to Morris all rights to its shares. For legal support, Chase relies on Texas Business and Commerce Code § 8.313(a)(1) (West 1991), which provides that certificated securities, such as those under consideration in this case, are transferred to a purchaser at "the time he or a person designated by him acquires possession" of them.[8] Chase contends that because Dennis Morris was a "person designated by [the purchaser]," and 50-Off voluntarily gave its shares to Morris, 50-Off did not hold any rights to possession or ownership when Chase allegedly converted the stock on November 18. In response, 50-Off argues that Morris, the escrow agent, was designated by it and not by the purchasers so that 50-Off maintained rights of possession over the stock — through Morris — until November 18.

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8. Also relevant is Section 8.301 of the Texas Business and Commerce Code, which provides: "(a) Upon transfer of a security to a purchaser (Section 8.313), the purchaser acquires the rights in the security which his transferor had or had actual authority to convey unless the purchaser's rights are limited by Section 8.302(d)."

Consistent with Texas law, the district court instructed the jury that "[i]n a claim for conversion, a plaintiff must show [ ] that (1) the defendant wrongfully exercised dominion or control over the property to the exclusion of, or inconsistent with the plaintiff's rights of possession. . . ." Therefore, when the jury concluded that Chase converted the stock, it implicitly found that 50-Off — through its escrow agent Morris — retained rights of possession over the 1.5 million shares until November 18.

After reviewing the record, we find sufficient support — through, among other things, the escrow agreement and Morris's testimony — for this implicit jury finding. Moreover, as 50-Off points out, Chase did not advocate this "purchasers' designee" theory before the jury. For example, in its closing argument, Chase barely mentions Morris, stating only, "Dennis Morris, the escrow agent . . . was the one whose job it was to take this stock, take the money, and get the exchange made. Mr. Morris testified that that was his job. There's a contract that spells out that that was his job . . . , the escrow agreement." If anything, Chase's own closing argument treats Morris as 50-Off's agent, and not as the purchasers' designee.

In light of the jury's implicit finding that 50-Off — through Morris — retained rights to possession of the stock and the support for that finding within the record, we reject Chase's contention that as a matter of law no conversion took place on November 18.[9]

9. The facts in this case are different from those in a typical conversion case, in which the tortfeasor takes possession of the

(Cont'd)

B.

Chase next argues that it cannot be held liable for conversion because 50-Off suffered no actual damages. Chase also contends that if 50-Off did suffer actual damages, these damages were not a result of Chase's actions. We reject both of Chase's arguments.

Damages are an element of a conversion claim under Texas law. *See Reed v. White, Weld & Co., Inc.*, 571 S.W.2d 395, 397-98 (Tex. Civ. App. 1978, no writ). Conversion damages "are limited to the amount necessary to compensate the plaintiff for the actual losses or injuries sustained as a natural and proximate result of the defendant's conversion." *United Mobile Networks, L.P. v. Deaton*, 939 S.W.2d 146, 148 (Tex. 1997). The proper measure of damages for conversion is generally the fair market value of the converted material on the date that it was converted, plus any other

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(Cont'd)
converted property. Here, Chase committed certain errors that helped thieves steal 50-Off's stock. Although this factual scenario is atypical, it still satisfies the elements of the tort and Chase does not argue to the contrary. *See, e.g.*, Restatement of Torts (Second) § 222 (1965) ("If the dispossession seriously interferes with the right of the other to control the chattel, the actor may also be subject to liability for conversion."); *D & G Equip. Co., Inc. v. First Nat'l Bank of Greencastle*, 764 F.2d 950, 955-58 (3d Cir. 1985) (bank liable for conversion, under the UCC, when it permitted unauthorized former corporate executive to deposit and disburse corporate funds to his personal account); *Sherrill White Constr. Co. v. South Carolina Nat'l Bank*, 713 F.2d 1047, 1049-51 (4th Cir. 1983) (bank liable for conversion when it accepted and cashed unauthorized checks from corporation).

losses suffered as a natural and proximate cause of the conversion. *See id.*; *Quest Medical, Inc. v. Apprill*, 90 F.3d 1080, 1086 & n.6 (5th Cir. 1996). In this case, the judge instructed the jury that, if they found that Chase had converted the stock, they "may award 50-Off Stores the fair market value of the stock on the day and at the place it was converted and any other losses or expenses which were a natural and proximate cause of the conversion." Chase did not challenge the correctness of the jury charge on this issue and does not do so here. Our question, then, is whether the evidence is sufficient to support the jury's award based on these instructions.

Chase argues that because the purchasers were thieves and never intended to pay for the stock, 50-Off did not show that Chase's actions caused 50-Off any loss. In support of its argument, Chase relies primarily on *Deaton*, 939 S.W.2d at 148-49. In *Deaton*, the defendant had converted the plaintiff's customer list by illegally copying the list. The plaintiff sought damages equal to the list's value, basing this valuation on the income the list had generated. The Supreme Court of Texas held that the plaintiff failed to prove damages because it provided no proof that the defendant's conversion lowered the value of the plaintiff's customer list. *Id. Deaton*, however, is inapposite to the case at hand. In *Deaton*, the court found no proof of damages because the plaintiff never lost its customer list. The defendant converted the list by reproducing it, not by taking the only available copy of the list. The plaintiff submitted no evidence that the value of its original list had been lowered by the defendant's conversion. *Id.* Here, Chase did not copy or otherwise duplicate the stock. Instead, Chase moved the actual 1.5 million shares into BPS's

account before 50-Off or Morris received any payment for the shares. While Chase is correct that *Deaton* stands for the proposition that a conversion plaintiff must prove that the loss of the converted material caused the damages claimed, *Deaton* has no further application to the facts of this case.

In this case, according to Chase's own expert's testimony, if Chase had noticed the conflict between the delivery ticket and the customer's order, the stock would have been returned to the issuer, 50-Off, or at least held by Chase until it was determined whether money was owed on the stock. If Chase had acted in this manner, the 1.5 million shares would have been returned to 50-Off, if not in late November, then at some later time. 50-Off could have then found new purchasers for the stock. It is the proceeds from this later sale — actual damages — that Chase's conversion prevented 50-Off from realizing.[10] Or, more simply put, the shares had value when they were deposited at Chase. When

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10. Chase states that "50-Off's sole damage theory posited that the thieves would have paid the purchase price absent the alleged conversion. . . ." The record, however, does not support Chase's characterization of 50-Off's argument. 50-Off presented evidence that if Chase had acted correctly, the stock would have been returned to 50-Off. During its closing argument, 50-Off stated that if Chase had "followed that agreement [made at the deposit window] this stock never would have gotten into the hands of the thieves." 50-Off is therefore not limiting its claim to one that the thieves would have paid for the stock. At most, 50-Off argues that, absent Chase's conversion, either Koutsoubos would have paid for the stock (which he did in some of his previous stock purchases) or the stock would have been returned to 50-Off. In either case, whether Koutsoubos intended to pay for the stock or not does not alter the basic fact that the stock had value when Chase converted it.

Chase converted the stock, it took this value from 50-Off. Chase's conversion was thus a cause of 50-Off's damages.

C.

We turn next to the propriety of the compensatory damage award. This issue turns on whether the record supports the award.

When we divide the compensatory damage award of $5.475 million by the numbers of shares converted — 1.5 million — it is clear that the jury found that each share had a fair market value of $3.65. Fair market value is the price that a willing purchaser would pay for the stock and the price that would cause a willing seller to part with the stock, when such a sale is an arms-length transaction. *See, e.g., Quest Medical*, 90 F.3d at 1086. Because Koutsoubos probably never intended to pay the price he negotiated for the stock, the stock price that Koutsoubos agreed upon with 50-Off is not a useful indication of fair market value. It only shows what price 50-Off would accept, not the price an arms-length purchaser would pay.

The price Koutsoubos agreed to pay, however, was not the only evidence of the stock's value. 50-Off presented evidence that in the week prior to arranging the 1.5 million share sale to Koutsoubos, it sold 310,000 shares to European investors at $3.75 per share in an arms-length transaction. 50-Off also presented evidence that it had received an offer from another legitimate buyer for 190,000 shares at $3.65 per share.[11] In addition, the jury was told that on November 18, 1994, the

11. This proposed sale was not completed on Koutsoubos's request.

date of the conversion, 50-Off shares were trading on the NASDAQ market at between $4.375 and $4.75 per share. Because shares from a Regulation S offering cannot be sold immediately to American investors, these shares sell for less than the unrestricted shares trading on markets such as the NASDAQ. The jury heard expert testimony indicating that a 20 percent discount for Regulation S shares was plausible. Thus, a fair market value of $3.65 per share in a Regulation S offering is reasonable for a stock trading on the NASDAQ exchange at between $4.375 and $4.75 per share. In sum, there is ample evidence to support the jury's finding that on November 18, 1994, the 50-Off stock had a fair market value of $3.65 per share and that the conversion of the 1.5 million shares caused 50-Off to suffer a loss of $5.475 million.

III.

Chase next challenges the jury award of $138 million in punitive damages. Because we agree with Chase that the evidence is insufficient to support an award of punitive damages in this case, we vacate the jury's punitive damage award.[12]

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12. Chase also contends that the district court's jury instructions for awarding punitive damages were incorrect. However, Chase failed to preserve this issue for appeal. We therefore do not consider this argument and assume without deciding that the jury instructions on punitive damages were correct as given.

50-Off argues that Chase also waived the issue of whether the evidence was sufficient to support an award of punitive damages by failing to include that issue within its motion for judgment as a matter of law. After reviewing the record, we conclude that Chase's (Cont'd)

The court instructed the jury that it could award punitive damages if "the defendant acted with malice or willfulness or with callous and reckless indifference to the safety or rights of others." The court also instructed the jury that the defendant's behavior must be "shocking and offensive" before it could award punitive damages. Chase did not object to the district court's charge. We therefore review the record to determine whether the evidence is sufficient for the jury to determine that Chase's behavior was malicious or willful or made with callous and reckless indifference so as to warrant a punitive damage award. After a careful review of the record, we conclude that no matter how 50-Off attempts to massage the facts, Chase did not act in a manner justifying an award of punitive damages.

A low-level Chase employee conducting high-volume business made an error that led to the unpaid-for 50-Off stock being deposited "free" into BPS's account. As previously discussed, this error constituted conversion and rendered Chase liable for substantial damages. However, despite 50-Off's claims to the contrary, it presented no evidence that Chase or any of its employees intended to illegally convert the stock or otherwise aid in Koutsoubos's criminal scheme.[13]

(Cont'd)

objection to the jury charge on this issue — in which Chase argued that the evidence was insufficient to submit the question of punitive damages to the jury — was sufficient to preserve the error for appeal under Fed. R. Civ. P. 50. *See, e.g., Scottish Heritage Trust, P.L.C. v. Peat Marwick Main & Co.*, 81 F.3d 606, 610-11 (5th Cir. 1996); *Polanco v. City of Austin, Texas*, 78 F.3d 968, 973-75 (5th Cir. 1993).

13. Just because Chase possessed the intent required for conversion — that is, the intent to move the stock from the holdover

(Cont'd)

In addition to making the processing error constituting the conversion, Chase was slow to react to 50-Off's expressions of concern in January and February 1995. 50-Off contacted Chase and made the bank aware of possible problems with the 50-Off stock transaction. Chase took weeks to follow up on these complaints and to ascertain what had taken place. If Chase had reacted faster or more aggressively, Koutsoubos and his coconspirators might have been stopped before all the 50-Off stock was sold. However, beyond these two points — the processing error and the delay — there is little support for the award of punitive damages, and this evidence alone is not sufficient to warrant an award of punitive damages.

50-Off places special emphasis on the fact that Chase had an indemnity provision with BPS. 50-Off notes that when it brought its concerns to Chase's attention, Chase reminded BPS that it expected to be indemnified for any losses or damages it suffered from following BPS's instructions. 50-Off contends that this evidence demonstrates that Chase was willing maliciously to ignore the rights of 50-Off or any other small company so long as such a request came from an important customer such as BPS.

50-Off, however, ignores a major point. BPS was a customer of Chase, and therefore Chase owed BPS important duties. *See, e.g., King v. Crossland Sav. Bank*, 111 F.3d 251,

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(Cont'd)
account into BPS's account — does not mean that Chase possessed the sort of wrongful intent required for punitive damages under the jury instructions. *See Winkle Chevy-Olds-Pontiac, Inc. v. Condon*, 830 S.W.2d 740, 746 (Tex. App. 1992, writ dism'd).

259 (2d Cir. 1997) (bank owes duty of care to customer); *Young v. U.S. Dep't of Justice*, 882 F.2d 633, 643 & n.12 (2d Cir. 1989) (bank owes duty of confidentiality to customer). 50-Off, on the other hand, was not a Chase customer (at least in this matter) and thus Chase's duties to 50-Off were limited. *See Renner v. Chase Manhattan Bank*, 1999 WL 47239, *13 (S.D. N.Y. 1999); *see also Guidry v. Bank of LaPlace*, 740 F. Supp. 1208, 1218 (E.D. La. 1990), *aff'd as modified*, 954 F.2d 278, 286-87 (5th Cir. 1992); *E.F. Hutton Mortgage Corp. v. Equitable Bank, N.A.*, 678 F. Supp. 567, 577-79 (D. Md. 1988). The only obligations Chase owed 50-Off evolved out of the events that took place at the deposit window. Far from Chase's loyalty to BPS being evidence of behavior deserving punishment, Chase might well have broken banking laws had it not protected BPS's confidences or had it released information without a subpoena or other court authorization. *See, e.g.*, N.Y. Banking Law § 134(5). Thus, it is not surprising that after becoming aware of possible problems with BPS's account, Chase reminded BPS that it expected to be indemnified for liabilities resulting from BPS's instructions. This evidence certainly does not support an inference that Chase acted maliciously toward 50-Off.

50-Off stresses a number of additional events, such as Chase's actions in the INNN stock fraud also committed by Koutsoubos, in an attempt to justify the award of punitive damages. However, after considering the record in detail, we conclude that these events — upon which 50-Off places considerable reliance — at most demonstrate errors in judgment and technical flaws in Chase's procedures that left them exposed to a cunning criminal such as Koutsoubos. These events do not demonstrate the sort of maliciousness,

willfulness, or reckless indifference that would support an award of punitive damages.

In sum, while Chase converted 50-Off's stock, the record evidence does not support an inference that Chase acted with such malice or reckless indifference as to justify an award of punitive damages. For this reason, the district court should not have submitted the issue of punitive damages to the jury. We therefore vacate the award of punitive damages.

IV.

Chase next argues that the district court made a number of evidentiary errors that mandate reversal and retrial. Chase contends that the district court should have admitted evidence and instructed the jury on proportionate responsibility among the Defendants and on 50-Off's failure to mitigate, and should not have excluded the deposition testimony of Claude Battiaz, the BPS executive in charge of BPS's relationship with Chase. We turn now to those arguments.

A.

Chase challenges the district court's decision to exclude evidence of the Defendants' proportionate responsibility and its refusal to instruct the jury on this issue.[14] In response,

14. Chase requested that the jury be given a special interrogatory assigning responsibility for the conversion among BPS, Betafid, S.A., Yanni Koutsoubos, Andalucian Villas (Forty Eight) Ltd., Arnass Ltd., Brocimast Enterprises, Ltd., Dennis Morris, Howard White, Aries Peak, Inc., and The Chase Manhattan Bank. The district court rejected this proposed interrogatory without explanation.

50-Off contends, first, that Chase waived this issue for appeal and, second, that the district court's ruling was correct.[15]

50-Off contends that Chase failed to identify the affirmative defense of proportionate responsibility as a contested issue of fact or law in the Pretrial Order and also failed to timely request an instruction or special interrogatory on the issue. 50-Off acknowledges that Chase submitted a proposed proportionate responsibility special interrogatory. However, 50-Off contends that because this interrogatory was submitted only after 50-Off had closed its case and after BPS had settled, it would have been "manifestly unjust" for the trial court to have allowed Chase to raise a new defense theory so late in the trial, citing *Flannery v. Carroll*, 676 F.2d 126, 130-31 (5th Cir. 1982) (plaintiff barred from raising claim not contained in pretrial order, except by having the district court approve a motion to amend the pretrial order).

Chase does not deny that it failed to raise the defense in the Pretrial Order. Rather, Chase contends that it did not waive the issue because it raised the defense of the Defendants' comparative responsibility in its answers and in a pretrial motion. Chase did raise the issues of comparative responsibility and comparative negligence in its answer, although it is not clear whether Chase was referring to the other Defendants or to 50-Off and its advisors. The motion

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15. In its initial brief, Chase challenged the district court's exclusion of evidence of negligence by 50-Off, Akin, Gump, and Jefferies. 50-Off contended that Chase was procedurally barred from raising this issue on appeal. In footnote 27 of its reply brief, Chase concedes this point. In the text of the reply brief, Chase focuses solely on the alleged error concerning the responsibility of the other Defendants.

Chase refers us to, however, focuses on the actions of 50-Off and its law firm and does not mention either comparative responsibility or comparative negligence in reference to the other Defendants' actions. Thus, Chase asks that we remand this case for a new trial because the district court rejected a requested jury interrogatory based on a defense that was not clearly raised in the Pretrial Order, in Chase's answers, or at trial until after 50-Off had rested its case. The district court did not abuse its discretion in refusing to give this issue to the jury under the circumstances and a remand for trial of this defense is not warranted. *See* Fed. R. Civ. P. 16.

B.

Chase next contends that the district court erred in excluding evidence of 50-Off's failure to mitigate damages and in refusing to instruct the jury on mitigation. After reviewing the record, we find no error.

In *Bank One, Texas, N.A. v. Taylor*, 970 F.2d 16 (5th Cir. 1992), we set forth the predicate a litigant must establish in order to have the issue of mitigation presented to the jury. We stated: "One who claims a failure to mitigate damages has the burden to prove not only a lack of diligence on the part of [the] injured party, but also the amount by which damages were increased by such failure to mitigate." *Id.* at 29.

Chase contends that 50-Off could have taken two steps to reduce its damages. First, it argues that 50-Off could have sought a court order enjoining Chase from transferring the stock. Second, it argues that 50-Off could have diluted its

total outstanding shares by issuing additional shares of stock and thereby reducing its loss from the converted shares.

Chase failed to cite to the district court or to this Court a single case in which a court has held that a litigant's failure to seek an injunction enjoining expected harmful conduct is required for that litigant to recover for its full damages.[16] As we stated in *Bank One*: "an injured party is required to incur only slight expense and reasonable effort in mitigating his damages." 970 F.2d at 29 (internal quotation marks omitted). We are satisfied that neither of the actions Chase contends 50-Off should have taken meet this test. Also, the record is bare with respect to the extent of any savings 50-Off would have enjoyed if it had sought and obtained an injunction in late January or early February 1995, when 50-Off first became aware that the stock was at risk. For example, on February 15, 1995, approximately 900,000 shares of stock remained in Cede & Co., but the record does not establish the value of those remaining shares as of that date. Similarly, Chase proffered no evidence tending to show the extent of 50-Off's savings if it had diluted its stock.

Chase did not demonstrate that a legitimate jury question was presented from which a jury could have determined that 50-Off failed to mitigate its damages by not undertaking the actions described above. Because no genuine issue of fact

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16. Chase points to NY Banking Law § 134(5) in support of its argument that — absent a court order — New York law prohibited it from recognizing any claim adverse to its depositor to securities on deposit in the bank. Whatever effect is to be given to this statute, Chase did not argue this statute to the district court in support of its mitigation argument and cannot raise it for the first time on appeal.

was presented, the district court did not err in excluding the evidence and in refusing to instruct the jury on mitigation.

C.

Chase next contends that the district court abused its discretion by excluding the deposition testimony of Claude Battiaz, a BPS executive in charge of that bank's relationship with Chase. The taking of Battiaz's deposition involved a complex and disorganized stream of events, which included conflicts between Swiss and American civil procedure, confusion over the required oaths, and the presence of a translator for only half of the deposition. Considering this confusion and the incompleteness of Battiaz's deposition, we conclude that the district court did not abuse its discretion in excluding Battiaz's deposition testimony.V.

Chase contends, and 50-Off concedes, that the award of prejudgment interest and the award of consequential damages are duplicative — both serve to compensate the plaintiff for the loss of use of the converted property. *See Harris v. Christianson-Keithley Co.*, 303 S.W.2d 422, 427-28 (Tex. Civ. App. 1957, writ ref'd n.r.e.). Therefore, we vacate the award of prejudgment interest.

Appendix A

CONCLUSION

In this case, 50-Off, a discount retail store, sued to recover damages for losses it suffered as the victim of an international securities fraud. 50-Off was awarded substantial compensatory, consequential, and punitive damages against Chase, one of the banks through which the securities fraud was consummated. Although the jury was entitled to find that Chase converted 50-Off's stock, Chase did not act in such a manner as to justify an award of punitive damages. We therefore vacate that award. We also vacate the district court's award of prejudgment interest.

AFFIRMED in part, VACATED in part.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION DATED AND FILED DECEMBER 4, 1997

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL NO. SA-95-CA-159

50-OFF STORES, INC.

Plaintiff,

v.

BANQUE PARIBAS (SUISSE) S.A., et al.,

Defendants,

v.

THE CHASE MANHATTAN BANK, N.A., et al.,

Third-party defendants.

JUDGMENT

The Court has conducted the jury trial of this cause. After having considered the entire record, including the jury's answers to the special interrogatories, the Court hereby enters judgment in favor of plaintiff 50-Off Stores, Inc. against defendant The Chase Manhattan Bank in the amount of one

hundred forty-eight million five hundred seventy-five thousand dollars and no/100 cents ($148,575,000.00) plus costs of court. This reflects a credit of two million four hundred thousand dollars and no/100 cents ($2,400,000.00) as a result of plaintiff 50-Off Stores, Inc.'s settlement with defendant Banque Paribas (Suisse) S.A. Additionally, the Court awards plaintiff 50-Off Stores, Inc. pre-judgment interest on the sum of twelve million nine hundred seventy-five thousand dollars and no/100 cents ($12,975,000.00) at the annual rate of 10 percent per annum, to be paid from November 18, 1994, until the date of entry of this judgment. Post-judgment interest shall accrue at the rate of 5.42 percent.

Signed this 4th day of December, 1997.

s/ H.F. Garcia
H. F. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 30, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50288

50-OFF STORES INC

Plaintiff – Appellee

v.

BANQUES PARIBAS (SUISSE) S A, ET AL

Defendants

HOWARD WHITE

Third Party Plaintiff

v.

THE CHASE MANHATTAN BANK, N A

Defendant – Third Party Defendant – Appellant

Appeal from the United States District Court for the
Western District of Texas, San Antonio

Appendix C

ON PETITIONS FOR REHEARING
AND REHEARING EN BANC

(Opinion 07/01/99, 5 Cir., __, __ F.3d __)

Before DAVIS, STEWART, and PARKER, Circuit Judges.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

* * *

ENTERED FOR THE COURT:

s/ [illegible]
United States Circuit Judge

(2)

No. 99-749

Supreme Court, U.S.
FILED
1999

In The

Supreme Court of the United States

LOT$OFF CORPORATION,

Petitioner,

v.

THE CHASE MANHATTAN BANK, N.A.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

A. Introduction

Conned by thieves pretending to be purchasers of its stock, Petitioner issued stock certificates in the name of a bank where the thieves had an account. That bank, a customer of The Chase Manhattan Bank ("Chase"), directed Chase to deposit the certificates into its account at Chase. Following its customer's instructions, Chase dutifully did so. The stock ended up in the hands of the thieves who made off with it without paying Petitioner.

Petitioner sued the thieves and their bank. Twenty-one months later – as an apparent after-thought – it sued Chase. During trial, the thieves' bank settled, and the case went to the jury against Chase alone, the thieves having defaulted. The jury found Chase liable for $12,975,000 in compensatory, and $138,000,000 in punitive damages – an award five times higher than the largest punitive damage award ever affirmed by a federal court.

On appeal, the Fifth Circuit reversed the punitive damages, finding the evidence legally insufficient to establish the malice or recklessness required by Texas law for a punitive award. In particular, the court found that Chase's conduct amounted, at worst, to a "processing error" and that Chase was simply "slow to react" to Petitioner's expressions of concern about possible problems.[1]

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[1] At trial and on appeal, Chase urged that it was Petitioner's own carelessness in issuing the stock and failing to respond to indications of improper conduct by the thieves which caused any loss and, in any event, that nothing Chase

B. Proceedings Below

At the close of Petitioner's case, Chase made a motion for judgment as a matter of law on the ground that Petitioner had not established its conversion claim – the claim on which its prayer for punitive damages rested. The trial court denied that motion, as well as the renewed motion for judgment as a matter of law on the same ground which Chase made after the close of all evidence. The next day, before the jury was charged, Chase objected to the submission of any instruction on punitive damages on the ground that there was no evidence to support a punitive award. The District Court overruled the objection.

On appeal, the Fifth Circuit vacated the punitive damages award, finding that Chase's liability for conversion was, at worst, the result of a processing error made by a "low-level Chase employee conducting high-volume business." Pet. App. A at 19a; *50-Off Stores, Inc. v. Banques Paribas (Suisse), S.A.*, 180 F.3d 247, 256 (5th Cir. 1999). Although the court found that Chase was "slow to react" to Petitioner's expressions of concern about the stock, it concluded that neither the processing error nor the delay warranted any punitive award. Pet. App. A at

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did, or failed to do, contributed to the damages claimed. Remarkably, in its Petition, Petitioner concedes the latter point by stating that its damages resulted from failing to receive the stock proceeds in time to "obtain merchandise for the [1994] holiday season." Petition for Certiorari ("Pet.") 11. From the chronology of events set forth in the Petition itself, however, it is unquestionable that the conduct of Chase about which Petitioner complains could not possibly have caused it any loss until *1995*. *Id.* 9-12

20a; *50-Off Stores*, 180 F.3d at 256. The court also held that Petitioner's evidence demonstrated "at most . . . errors in judgment and technical flaws in Chase's procedures that left them exposed to a cunning criminal." Pet. App. A at 21a; *50-Off Stores*, 180 F.3d at 257. "[D]espite [Petitioner's] claims to the contrary," the Court noted, "it presented no evidence that Chase or any of its employees intended to illegally convert the stock or otherwise aid in [the thieves'] criminal scheme." Pet. App. A at 19a; *50-Off Stores*, 180 F.3d at 256.

Petitioner seeks review in this Court solely on the ground that Chase did not make a formal Rule 50 motion before the case went to the jury.

II. ARGUMENT

A. Chase Adequately Preserved Its Objection To The Sufficiency Of Evidence On Punitive Damages.

1. The Fifth Circuit's Opinion Is Fully Consistent With Prior Decisions.

Petitioner argues that this case is distinguishable from the two cases the Fifth Circuit cited in support of its ruling, *Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.*, 81 F.3d 606, 610-11 (5th Cir. 1996), *cert. denied*, 519 U.S. 869 (1996), and *Polanco v. City of Austin*, 78 F.3d 968, 975 (5th Cir. 1996), because the defendants in those cases had filed Rule 50 motions at the close of the plaintiffs' case. Pet. 21. But the Circuit has often held that an objection to a jury instruction preserves an insufficiency

claim without a Rule 50 motion. *See, e.g., Jones v. Benefit Trust Life Ins. Co.*, 800 F.2d 1397, 1401 (5th Cir. 1986) (objection to jury instruction on damages for mental distress preserves right to raise issue in motion for judgment n.o.v. even though party did not move for directed verdict on same grounds); *Texoma Ag-Products, Inc. v. Hartford Accident & Indemnity Co.*, 755 F.2d 445, 448 (5th Cir. 1985) (party preserved error by objecting to jury charge on sufficiency of evidence grounds without motion for directed verdict); *Wells v. Hico Independent School Dist.*, 736 F.2d 243, 251-52 (5th Cir. 1984) (same), *cert. dismissed*, 473 U.S. 901 (1985); *Splitt v. Deltona Corp.*, 662 F.2d 1142, 1144 (5th Cir. 1981) (defendant's objection to jury instruction on punitive damages preserved issue without motion for a directed verdict on that issue).

Splitt is directly on point. In that case, the defendant moved for a directed verdict on the ground that there was no evidence to support the plaintiff's fraud claim. The defendant also objected to a jury instruction that permitted the jury to find punitive damages on the plaintiff's contract claim. The Fifth Circuit held that the objection to the jury instruction preserved the defendant's right to move for a judgment n.o.v. on punitive damages. *Splitt*, 662 F.2d at 1144-45. The court noted that the objection served the purpose of Rule 50 in that it gave plaintiffs notice of defendants' concern. *Id.*

In the present case, Chase moved for judgment as a matter of law on Petitioner's claim for conversion – the basis of its claim for punitive damages – and timely objected to the punitive damage charge on the ground

that there was no evidence warranting punitive damages. Petitioner had ample notice that Chase was challenging the sufficiency of the evidence on punitives and ample opportunity to offer further evidence – if any there was – to support it.

2. Rule 50 Is Applied Liberally.

Petitioner incorrectly suggests that the Fifth Circuit's application of Rule 50 is inconsistent with that of other circuits and the 1991 amendment to the rule. In fact, there are many cases from other circuits decided both before and after the 1991 amendment affirming that Rule 50 is to be applied liberally. *See, e.g., Rankin v. Evans,* 133 F.3d 1425, 1433 (11th Cir. 1998) ("where the trial court and all parties actually are aware of the grounds upon which the motion is made, strict enforcement of the specificity requirement of Rule 50(a)(2) is unnecessary to serve the purpose of the rule"), *cert. denied,* 119 S.Ct. 67 (1998); *McClaran v. Plastic Industries, Inc.,* 97 F.3d 347, 360 (9th Cir. 1996) (objection to jury instruction on ground of insufficient evidence preserved issue for post-trial Rule 50 motion); *Singer v. Dungan,* 45 F.3d 823, 828-29 (4th Cir. 1995) (noting that "various courts have taken an indulgent view as to what constitutes a sufficient predicate for a Rule 50(b) motion"); *Anderson v. United Telephone Co.,* 933 F.2d 1500, 1503 (10th Cir. 1991) (rigid application of Rule 50 is inappropriate where such application serves neither of the rule's rationales – protecting Seventh Amendment right to trial by jury and ensuring opposing party has enough notice of error to permit an attempt to cure it before resting), *cert. denied,*

502 U.S. 940 (1991); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1331 (6th Cir. 1988) ("in light of 'liberal spirit imbuing the Federal Rules of Civil Procedure,' technical non-compliance with Rule 50(b)'s requirements will not preclude consideration of a JNOV motion so long as the purposes of the rule have been served in a particular case"); *Trujillo v. Goodman*, 825 F.2d 1453, 1456 (10th Cir. 1987) (noting trend is to adopt a liberal view of what constitutes a motion sufficient to preserve a party's rights under Rule 50(b); considering merits of Rule 50(b) motion despite moving party's failure to bring Rule 50(a) motion at close of evidence); *Miller v. Rowan Companies, Inc.*, 815 F.2d 1021, 1024 n.4 (5th Cir. 1987) ("This Circuit and others have rejected the rigid application of Rule 50(b) in favor of a more liberal approach" (citing cases)); *Bonner v. Coughlin*, 657 F.2d 931, 939 (7th Cir. 1981) (Seventh Circuit has rejected rigid interpretation of the requirements of Rule 50(b)). Commentators also agree that rigid adherence to the technical requirements of the rule is inappropriate. *See, e.g.*, 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2537 at 336-39 (2d ed. 1994) (because Rule 50 "is a potential trap for the unwary, the federal courts fortunately take a liberal view of what constitutes a motion for judgment as a matter of law at the close of all the evidence in deciding whether there was a sufficient prerequisite for the later motion").[2]

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[2] The only support Petitioner can find for its claim that a formal pre-verdict motion is necessary comes from the *dissent* in *Anderson v. United Telephone Co.*, 933 F.2d 1500 (10th Cir. 1991). Pet. 22 n.5. Indeed, Petitioner acknowledges that there is no need for strict compliance with Rule 50 if the departure is "de

B. Petitioner Was Not Surprised Or Disadvantaged In Any Way.

Petitioner asserts it was "lulled into complacency" by Chase's failure to style its objection to the jury charge as a Rule 50 motion. Pet. 24. This assertion cannot be seriously entertained. Whether Chase had converted the stock – the basis of Petitioner's punitive damage claim – was central to the action and vigorously contested throughout. That Chase denied committing any wrong, much less one which would support a punitive award, could hardly have been a surprise to Petitioner. Chase's objection even to the submission of the punitive damage issue to the jury excluded any possible doubt that it was challenging the sufficiency of the evidence on that point. This was no "stealth" issue, raised for the first time by Chase in its post-trial motions.

C. The Court Of Appeals Did Not Violate Petitioner's Right To A Jury.

Petitioner argues that the Court of Appeals violated its right to a jury trial because it examined the evidence

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minimis" or the party makes a motion which is the "functional equivalent" of a Rule 50 motion. Pet. 16. *See also Davis v. First Nat'l Bank*, 976 F.2d 944, 948-49 (5th Cir. 1992) (excusing de minimis failure to comply with letter of Rule 50(b) and noting that "both this circuit and the Seventh Circuit have approached this issue with a 'liberal spirit' "), *cert. denied*, 508 U.S. 910 (1993); *Merwine v. Board of Trustees*, 754 F.2d 631, 634-35 (5th Cir. 1985) (excusing technical non-compliance with Rule 50), *cert. denied*, 474 U.S. 823 (1985); *Bohrer v. Hanes Corp.*, 715 F.2d 213, 216-17 (5th Cir. 1983) (same), *cert. denied*, 465 U.S. 1026 (1984).

and vacated the jury's punitive damages finding. Pet. 25-26. But Petitioner admits, as it must, that an appellate court may determine whether evidence is sufficient as a matter of law. Pet. 25. That is exactly what the Circuit did, concluding that the facts, taken as true, did not meet the standard for a punitive award under Texas law. Pet. App. A at 2a, 18a-22a; *50-Off Stores, Inc. v. Banque Paribas (Suisse) S.A.*, 180 F.3d 247, 249, 256-57 (5th Cir. 1999).

Sufficiency of the evidence is a question of law, subject to plenary review. *Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 10 (1st Cir. 1998). It does not usurp the jury's province as factfinder to vacate a judgment based on legally insufficient evidence. *Galloway v. United States*, 319 U.S. 372, 388-89 (1943). Petitioner's Seventh Amendment argument is without merit.

III. CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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